



ARKANSAS JUDICIARY

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Rule 45. Subpoena.

(a) Form and Issuance. A subpoena issued by the clerk shall be under seal, state the name of the court and the title of the action, and command each person to whom it is directed to appear and give testimony at the time and place therein specified. An attorney admitted to practice in this State, as an officer of the court, may also issue and sign a subpoena in any action pending in a court of this State in which the attorney is counsel of record.

(b) For Production of Documentary Evidence.

(1) Any subpoena issued pursuant to this rule may command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. The subpoena need not be joined with a subpoena to appear for a deposition, hearing, or trial. If a subpoena does not command an appearance, then it must be served by e-mail, facsimile, or hand delivery on all other parties at least three (3) business days before the subpoena is served on the person to whom it is directed. The party issuing a subpoena that does not command an appearance must promptly provide a copy to all other parties of all material produced in response to the subpoena.

(2) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive or (ii) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

(c) Service. A subpoena for a trial or hearing or for a deposition may be served at any place within this State in the manner prescribed in this subdivision. A subpoena for a trial or hearing or for a deposition may be served by the sheriff of the county in which it is to be served, by his deputy, or by any other person who is not a party and is not less than eighteen (18) years of age. Service shall be made by delivering a copy of the subpoena to the person named therein; provided, however, that a subpoena for a trial or hearing may be served by telephone by a sheriff or his deputy when the trial or hearing is to be held in the county of the witness' residence. A subpoena for a trial or hearing or for a deposition may also be served by an attorney of record for a party by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or agent of the addressee.

(d) Subpoena for Trial or Hearing. At the request of any party the clerk of the court before which the action is pending shall issue a subpoena for a trial or hearing, or a subpoena for the production at a trial or hearing of documentary evidence, signed and sealed, but otherwise in blank, to the party requesting it, who shall fill it in before service. The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule. Notice of the subpoena shall be promptly given to all parties in the manner prescribed by Rule 5(b). A witness, regardless of

his county of residence, shall be obligated to attend for examination on trial or hearing in a civil action anywhere in this State when properly served with a subpoena at least two (2) days prior to the trial or hearing. The court may grant leave for a subpoena to be issued within two (2) days of the trial or hearing. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the trial or hearing. In the event of telephone service of a subpoena by a sheriff or his deputy, the party who caused the witness to be subpoenaed shall tender the fee prior to or at the time of the witness' appearance at the trial or hearing. If a continuance is granted and if the witness is provided adequate notice thereof, reservice of the subpoena shall not be necessary. Any person subpoenaed for examination at the trial or hearing shall remain in attendance until excused by the party causing him to be subpoenaed or, after giving testimony, by the court.

(e) Subpoena for Taking Depositions: Place of Examination. Upon the filing of a notice of deposition upon oral examination pursuant to Rule 30(b), the clerk of the court in which the action is pending shall, upon the request of the party giving notice, issue a subpoena in accordance with the notice. The subpoena may also be issued by an attorney pursuant to subdivision (a) of this rule. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of the rule. The witness must be properly served at least five (5) business days prior to the date of the deposition, unless the court grants leave for subpoena to be issued within that period. The subpoena must be accompanied by a tender of a witness fee calculated at the rate of \$30.00 per day for attendance and \$0.25 per mile for travel from the witness' residence to the place of the deposition.

The person to whom the subpoena is directed may, within ten (10) days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service, serve upon the attorney causing the subpoena to be issued written objection to inspection or copying of any or all of the designated materials. If objection is made, the party causing the subpoena to be issued shall not be entitled to inspect and copy the materials except pursuant to an order of the court before which the deposition may be used. The party causing the subpoena to be issued may, if objection has been made, move, upon notice to the deponent, for an order at any time before or during the taking of the deposition.

A witness subpoenaed under this subdivision may be required to attend a deposition at any place within 100 miles of where he resides, or is employed, or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(f) Depositions for Use in Out-of-State Proceedings. Any party to a proceeding pending in a court of record outside this state may take the deposition of any person who may be found within this state. A party who has filed a notice of deposition upon oral examination in an out-of-state proceeding, which complies with Rule 30(b), may file a certified copy thereof with the circuit clerk of the county in which the deposition is to be taken; whereupon, the clerk shall issue a subpoena in accordance with the notice. A deposition, including any subpoenas issued therefor, shall be subject to these rules as well as to any rule or statute creating a privilege or immunity from discovery. Any objection or motion for protective order with respect to the deposition shall be heard by a circuit judge of the county in which the deposition is to be taken.

(g) Contempt. When a witness fails to attend in obedience to a subpoena or intentionally

evades the service of a subpoena by concealment or otherwise, the court may issue a warrant for arresting and bringing the witness before the court at a time and place to be fixed in the warrant, to give testimony and answer for contempt.

Subpoena Form, rev. July 1, 2010

Reporter's Notes to Rule 45: - 1. Rule 45 contains numerous changes from FRCP 45. These changes are generally designed to continue certain procedures which were provided under superseded Arkansas law. Section (a) provides the mechanics for the issuance of a subpoena and whereas under FRCP 45 a subpoena is issued only by the court clerk, this section retains the authority of officers before whom depositions are taken to issue subpoenas for that purpose under Section (d). Superseded Arkansas law was found in Ark. Stat. Ann. 28-501, et seq. (Repl. 1962), the bulk of which is retained under this rule.

2. Section (b) provides for the issuance of a subpoena duces tecum. Superseded Ark. Stat. Ann. 28-357 (Repl. 1962) seemed to suggest that only those items which were admissible in evidence were subject to being subpoenaed. However, superseded Ark. Stat. Ann. 28-540 (Repl. 1962), which was patterned after FRCP 45(b), appeared to make the subpoena just as broad as that under the Federal Rule. The latter provides for the quashing of a subpoena duces tecum only for certain stated grounds and an objection based solely upon the alleged inadmissibility of the items sought is insufficient. *United States v. 691.81 Acres of Land*, 443 F. 2d 461 (C.C.A. 6th, 1971).

3. Section (c) permits any person authorized under Rule 4(c) to serve a summons to also serve a subpoena. Witnesses residing outside the county must receive five days' notice and those within the county three days' notice. Service by telephone is permitted where the witness is to be served in the same county where the trial is to be held. Ark. Stat. Ann. 28-508 (Repl. 1962) is superseded. The rule essentially incorporates provisions of superseded Ark. Stat. Ann. 28-510 and 28-514. Those statutes obligated a witness to attend a trial when properly served and tendered expenses and fees, and failure to do so authorized the court to hold the witness in contempt or have the witness arrested and brought before the court for contempt proceedings. Subpoenas to be served within three days of trial must be issued with leave of the court.

4. Section (d) also differs significantly from the Federal Rule concerning subpoenas for deposition purposes. Under the latter, the clerk issues the subpoena after formal notice is filed. Under this rule, following superseded Ark. Stat. Ann. 28-539 (Repl. 1962), the subpoena can be issued by either the court clerk or by an officer authorized to take depositions. The third paragraph of Section (d) is modified from the Federal Rule to provide simply that a witness subpoenaed for purpose of a deposition cannot be required to travel outside the county wherein he resides or transacts his business in order to give the deposition unless ordered to do so by the court.

5. Section (e) permits service of subpoenas throughout the State of Arkansas. It does not, however, attempt to regulate the enforcement of a subpoena which is to be served outside this State. Whether a sister state will honor an Arkansas subpoena depends upon the reciprocity between the two states and ultimately the law of the sister state.

Addition to Reporter's Note, 1986 Amendment: - Rule 45(c) is substantially revised. The 1986 amendment changes prior Arkansas practice by permitting any person who is not a party and is not less than 18 years of age to serve a subpoena, thus adopting the federal practice.

Moreover, the amended rule permits service of a subpoena by mail in the same manner as service of process under Rule 4(d)(8). The amended rule thus permits an attorney for any party to serve a subpoena by mail, so long as the requirements of Rule 4(d)(8) with respect to restricted delivery, return receipt, etc. are satisfied. The 1986 amendment also eliminates the distinction between witnesses residing in the county of trial and those residing outside the county. All witnesses must be served at least five days prior to trial, unless the court grants leave to allow service within that period, and all must be paid the same attendance fee and travel expenses. These fees, specified in the amended rule, must be paid at the time of trial, a change from the prior practice of requiring payment or tender of the fees at the time of service. Rule 45(c) also now makes plain that re-service of the subpoena is not necessary if a continuance is granted in the matter and the witness is given sufficient notice prior to his attendance. In that situation, the witness would be compelled to attend trial on the new date, and a new subpoena would not be required. Subsection (d) is also amended to make plain that the five-day minimum for service and the attendance and travel fee requirements apply to subpoenas for taking depositions as well as to subpoenas for appearance at trial. However, there is no change in the requirement that a deposition witness can be deposed only in the county where he resides, is employed, or transacts his business in person, absent a court order.

Addition to Reporter's Notes, 1988 Amendment: - Rule 45 is amended in an attempt to refine some changes made in subsections (c) and (d) in 1986. First, language in both subsections requiring payment of the witness fee at the time and place of the trial or deposition has been deleted. Under the amended rule, the witness fee must be paid or tendered when served with the subpoena, as was the case prior to the 1986 amendment. Second, language in both subsections basing the witness fee on the witness' "reasonable expenses for the loss of time based on [his] earnings" has been deleted. Accordingly, the witness fee is a flat \$30 per day. The latter change was made because of problems caused by occurrence witnesses who have claimed extremely high fees based on their earnings for a single day. Such highly paid individuals, like all other citizens, have a societal obligation to come forth and give evidence, much as they have an obligation to serve, when called, as jurors. To vary the witness fee to take into account their high salaries would cause obvious difficulties for litigants unable to pay such a fee. Expert witnesses are covered by Rule 26(b)(4)(C).

Addition to Reporter's Note, 1989 Amendment: - Rule 45 has undergone several modifications since it became effective in 1979. Because the 1989 amendment rewrites virtually the entire rule, previous Reporter's Notes are superseded and should be consulted only for historical purposes.

1. Subdivision (a) provides the mechanics for the issuance of a subpoena. Subpoenas may now be issued only by the clerk of court. Authority for the issuance of deposition subpoenas by officers before whom depositions may be taken has been eliminated.
2. Subdivision (b) provides for the issuance of a subpoena duces tecum. Except for minor technical corrections, this provision is unchanged.
3. Subdivision (c) governs service of subpoenas and makes clear that any subpoena, for either trial or deposition, may be served anywhere in the state. Moreover, the subdivision expressly provides that service of a subpoena by mail may be made by an attorney of record for either party. Telephone service of subpoenas is limited to sheriffs and their deputies, who may use this method of service with respect to trial subpoenas directed to witnesses who reside in the county where the trial is to be held. In addition, material from former subdivision

(c) governing trial subpoenas has been shifted to subdivision (d). Similarly, provisions regarding contempt have been placed under subdivision (g), which specifically addresses that issue.

4. Subdivision (d) applies to subpoenas for trials or hearings. Most of this material appeared in former subdivision (c). However, the revised rule reduces the period required for service of a subpoena prior to trial without leave of court from five to two days; increases the allowance for witness travel to trial to twenty-five cents per mile; clarifies the authority of the party who subpoenas a witness to excuse the witness prior to testimony by the witness; and eliminates an outdated provision authorizing the taking of depositions of witnesses exempt by law from personal attendance at trial. Pursuant to subdivision (c), a subpoena for a witness to appear at a trial or hearing may be served anywhere in the state.

5. Subdivision (e) governs subpoenas for the taking of depositions, including those for the production of documentary evidence. The 1989 amendment eliminates the authority of an officer authorized to take a deposition to issue subpoenas for depositions. Under the revised procedure, the clerk of court is to issue a subpoena for a deposition upon the request of a party and the filing by that party of a notice of the deposition complying with Rule 30. Consistent with the increase in travel allowance for trial witnesses under subdivision (d), the travel allowance for deposition witnesses is also increased to twenty-five cents per mile. However, although the period of notice to a witness prior to trial has been reduced to two days under subdivision (d), the period of notice to a deposition witness is five business days. In addition, the geographic limits within which a deposition witness is required to attend a deposition have been expanded from the county of the witness' residence to any place within 100 miles of where the witness resides, is employed, or transacts business in person. Pursuant to subdivision (c), a subpoena for a deposition may be served anywhere in the state.

6. Subdivision (f) establishes a procedure for the taking of depositions within the state for use in proceedings pending in other states. In conjunction with the adoption of this provision, Rule 28(c) has been modified to apply only to proceedings pending in foreign countries.

7. Subdivision (g) governs contempt proceedings. It is a condensed version of language that appeared in former subdivision (c), which seemed to apply only to trial subpoenas. This subdivision replaces a more general contempt provision found in former subdivision (f).

Addition to Reporter's Notes, 2000 Amendments: - Subdivision (a) has been amended to permit an attorney admitted to practice in Arkansas, as an officer of the court, to issue subpoenas in Arkansas cases in which he or she is counsel of record. Cross-references to subdivision (a) have also been added to subdivisions (d) and (e) of the rule. This authority does not apply to subpoenas pursuant to subdivision (f), which governs depositions for use in out-of-state proceedings; accordingly, a subpoena under subdivision (f) may be issued only by the clerk. The phrase "admitted to practice" in amended subdivision (a) refers not only to attorneys licensed in Arkansas, but also to those admitted pro hac vice.

In 1991, the corresponding federal rule was amended to allow attorneys to issue subpoenas. See Rule 45(a)(3), Fed. R. Civ. P. The federal rule expressly provides for sanctions, including lost earnings and reasonable attorneys' fees, against an attorney "responsible for issuance and service of a subpoena" that "impos[es] an undue burden or expense on the person subject to that subpoena." Rule 45(c)(1), Fed. R. Civ. P. While a similar provision has not been added to the Arkansas rule, the courts have inherent authority to sanction attorneys who abuse their power to issue subpoenas.

Addition to Reporter's Notes, [February] 2001 Amendment: - Subdivision (b) of the rule has been amended to emphasize that a subpoena duces tecum is permissible only in connection with a deposition, hearing, or trial. This has always been the case under Rule 45, but a clarifying amendment was deemed advisable in light of recent cases in which lawyers have employed subpoenas to obtain documents from non-parties without a deposition. The Supreme Court has not adopted a provision authorizing a subpoena solely to compel a non-party to produce documents or submit to an inspection. Compare Rules 34(c) & 45(a)(1)(C), Fed. R.Civ. P.

It also appears that some attorneys construed Rule 45 as not only allowing such a subpoena, but permitting one without notice to opposing counsel. Under the amended rule, there is no doubt but that these so-called "stealth subpoenas" are improper and that notice is necessary for any subpoena. If the subpoena is issued in connection with a deposition, subdivisions (e) and (f) expressly require notice of the deposition. Moreover, a new sentence has been added to subdivision (d) requiring that notice of a subpoena for a trial or hearing "be promptly given to all parties in the manner prescribed by Rule 5(b)."

Addition to Reporter's Notes, [May] 2001 Amendment: - Subdivision (f) has been amended by deleting the reference to chancery judges. Constitutional Amendment 80 established circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts.

Addition to Reporter's Notes, 2002 Amendment: - The third sentence of subdivision (f) has been amended to expressly provide that a deposition taken for use in an out-of-state proceeding is subject to the Rules of Civil Procedure, as well as to any rule or statute "creating a privilege or immunity from discovery." Previously, this sentence stated only that the Rules applied to subpoenas issued for such depositions. Also, the last sentence of subdivision (f) has been revised to include a specific reference to motions for protective orders made with respect to the deposition pursuant to Rule 26(c). The former version of this sentence mentioned only objections.

The following form for subpoenas is adopted and shall be published in the notes immediately following Rule 45 in the Court Rules volume of the Arkansas Code:

[link removed; for revised 2010 version of subpoena form, click here]

Addition to Reporter's Notes Regarding Subpoena Form (January 2002): - This form was designed for civil cases, including probate and juvenile matters, and should not be used in criminal proceedings. It is based on the form used in the federal courts. See Form AO 88, Subpoena in a Civil Case (Rev. 1994), reprinted in 1B Federal Procedural Forms 1:1270 (1999). However, it departs from the federal model as necessary to accommodate differences between the Arkansas Rules of Civil Procedure and the federal rules.

-Rule 45 does not mention the form, but the Supreme Court's order of adoption describes it as "official." In re Arkansas Rules of Civil Procedure, 340 Ark. 731, 733 (2000). Although use of an exact reproduction of the form is not mandatory, a subpoena must include all information called for by the form. For example, the second page of the form contains a "notice to persons subject to subpoenas" intended to advise those persons of their rights and duties under Rule 45. A subpoena without this information would be subject to challenge. However, so long as the necessary information is included, use of a "home-grown" document should not be fatal.

Additional information may be included if it is not inconsistent with Rule 45 or the form itself. For instance, a subpoena issued by the clerk might contain the name, address and phone number of the attorney who requested its issuance. Other information can be added in certain spaces on the form. The division in which the case is pending may also be included along with the street address in the box labeled "place of testimony."

On the other hand, modification of the form in such a way that distorts the controlling law or misleads the recipient is impermissible. Under Rule 45(b), for example, a subpoena duces tecum directed to a non-party is permissible only in connection with a deposition, hearing, or trial. Consequently, adding to the form a box to be checked and an accompanying statement to the effect that the recipient is commanded to permit inspection of specified documents at counsel's office on a given date, is not permissible. By contrast, the federal form offers this option, which is available under the federal rules. See Rules 34(c) & 45(a)(1)(C), Fed. R. Civ. P.

Unless a statute provides a procedure different from that specified in Rule 45, the rule and the form are applicable in probate and juvenile cases. Certain probate matters - such as will contests and adoptions - are "special proceedings" within the meaning of Rule 81(a) and thus excepted from the Rules of Civil Procedure if a statute sets out a different procedure. E.g., *Brantley v. Davis*, 305 Ark. 68, 805 S.W.2d 75 (1991). Some juvenile matters may also be special proceedings. See *Kelley v. State*, 191 Ark. 848, 88 S.W.2d 65 (1935). If there is no such statute, then the rules apply. *Norton v. Hinson*, 337 Ark. 487, 989 S.W.2d 535 (1999).

There appears to be only one statute that uses the word "subpoena" in connection with probate cases, and it does not conflict with Rule 45. See Ark. Code Ann. 5-2-317(b)(3). By statute, the Rules of Civil Procedure apply to "all proceedings" in juvenile cases "until rules of procedure for juvenile court are developed and in effect," except as otherwise provided by the juvenile code. Ark. Code Ann. 9-27-325(f). No such rules have been promulgated, and the only statute dealing with subpoenas in juvenile cases is not inconsistent with Rule 45. See Ark. Code Ann. 9-27-310(e). Accordingly, the rule and the subpoena form apply in probate and juvenile proceedings.

Addition to Reporter's Notes, 2010 Amendment: Subdivision (b) has been divided into two numbered paragraphs and amended to allow subpoenas solely for the production of books, papers, documents, or tangible things. The official form and notice have been revised to

accommodate subpoenas of this type, and a corresponding change has been made in Rule 34.

The amendment eliminates the long-standing requirement under Arkansas law that a subpoena duces tecum had to be joined with a subpoena for a witness to appear at a deposition, trial, or hearing. This requirement did not reflect actual discovery practice, for lawyers routinely cancelled depositions of nonparties who produced requested documents before the deposition date.

In addition, the amendment aligns Rule 45 with its federal counterpart. See Fed. R. Civ. P. 45(a)(1)(C). Unlike the federal rule, however, this rule does not permit a stand-alone subpoena to permit entry on and inspection of land. In that situation, an independent action must be brought against the nonparty to accomplish this discovery. See Ark. R. Civ. P. 34(c).

Revised Rule 45(b) also includes greater protections for other parties than the Federal Rules. A party who subpoenas only documents or things must serve the subpoena on all other parties at least three business days before serving the subpoena on the person in possession of the materials. This requirement will insure pre-production notice to, and an opportunity to object by, all other parties in the case. Moreover, the requesting party must provide a copy to all other parties of all materials?books, papers, documents, or tangible things?produced in response to the subpoena.

Addition to Reporter's Notes, 2010 Regarding Subpoena Form: See Rule 45, Addition to Reporter's Notes, 2010 Amendment, to allow subpoenas solely for the production of books, papers, documents, or tangible things. Subpoena Form

History Text:

History. Amended July 1, 1986, effective September 15, 1986; amended December 21, 1987, effective March 14, 1988; amended November 20, 1989, effective January 1, 1990; amended January 27, 2000; amended January 27, 2000, effective March 23, 2000; amended February 1, 2001; amended May 24, 2001, effective July 1, 2001; amended January 24, 2002

Associated Court Rules:

Rules of Civil Procedure

Group Title:

VI. Trials

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